

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's Rules)
Regarding Installment Payment Financing for)
Personal Communications Services (PCS))
Licensees)

WT Docket No. 97-82

To: The Commission

COMMENTS OF U.S. AIRWAVES, INC.

U.S. AirWaves, Inc. ("U.S. AirWaves"), by its attorneys, hereby submits its Comments regarding the Further Notice of Proposed Rule Making, FCC 00-197, released in the above-captioned proceeding on June 7, 2000 (the "Further Notice"). U.S. AirWaves was a participant in the first C block auction for broadband Personal Communications Services ("PCS") licenses ("Auction No. 5") and intends to bid in the upcoming C and F block auction presently scheduled for November 29, 2000 ("Auction No. 35").^{1/} U.S. AirWaves applauds many of the Commission's proposals in the Further Notice and believes that implementation of those proposals -- subject to important modifications discussed herein -- will speed the delivery of new and innovative services to the public, while simultaneously meeting the objectives that Congress set forth in Section 309(j) of the Communications Act of 1934, as amended ("Section 309(j)").

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^{1/} See "Auction of Licenses for C and F Block Broadband PCS Spectrum Postponed Until November 29, 2000," Public Notice, DA 00-1246 (June 7, 2000).

I. BACKGROUND

In 1994, U.S. AirWaves was created to bid in Auction No. 5 for C block broadband PCS licenses. U.S. AirWaves had a strong management team, a solid business plan, and a carefully thought-out approach to the auction, including specific targets and a maximum bid amount for each license on which it was prepared to bid. The team was led by John DeFeo -- the former President and Chief Executive Officer of the U.S. West New Vector Mobile Communications Group, and a participant in the PCS industry since 1989.

Because of the team U.S. AirWaves put together, and because of its persuasive business plan and disciplined approach to Auction No. 5, it was able to attract non-controlling equity investments from major global corporations, including Fluor Corporation, Sony and Hyundai, with additional financial backing from MCI. With help from these investors and others, U.S. AirWaves made the largest up-front payment of any entrant in the auction, approximately \$81 million.

At the auction, U.S. AirWaves was an active and enthusiastic bidder. As auction prices began to rise, however, U.S. AirWaves and its investors became increasingly concerned that the debt service obligations imposed by the artificially inflated bids would make it impossible to develop a viable PCS business.^{2/} Finally, in February 1996, as the bidding for major markets continued to spiral out of control, U.S. AirWaves made the painful decision to withdraw from the auction. Its deposit

^{2/} The perpetrator-in-chief of this reckless bidding strategy, of course, was NextWave Personal Communications, Inc. ("NextWave"), whose ultimate massive default on its promises came as no surprise to U.S. AirWaves. It is the licenses reclaimed by the FCC from NextWave -- after years of litigation that kept the public from receiving needed PCS services -- that form the core of the licenses available in Auction No. 35.

was refunded by the Commission and returned to its investors. The Company's founders, however, awaited precisely the opportunity that Auction No. 35 initially presented: the opportunity to enter a new auction unfettered by either the economic irrationality that ultimately undermined Auction No. 5 or the burden of having to outbid the established incumbents.

This background is recited at length herein because it is directly relevant to the proposals made by the Commission in the Further Notice. From the start of the C block auction process, U.S. AirWaves participated in good faith with the expectation that future C and F block auctions would be designed exclusively for entrepreneurs. As the Commission embarks on revising its C and F block auction rules in anticipation of Auction No. 35, it should do so with an understanding of this background and in a manner consistent with both fundamental principles of fairness and the intent of Congress in enacting Section 309(j).

U.S. AirWaves and other responsible entrepreneurs that bid in Auction No. 5 should not lose the opportunity intended by Congress. The Commission already diminished that opportunity to a significant extent, when it accorded special dispensation to those "successful" participants in Auction No. 5 who later found themselves overextended.^{3/} To further reduce that opportunity -- by now forcing small businesses to bid against the largest corporations in the world for a majority of

^{3/} See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 16436, 16452-16458 (1997). Licenses that should have been canceled or surrendered for nonpayment, and thus made available for re-auction, instead were allowed to be retained by many of the same parties that, along with NextWave, thoroughly undermined the success of Auction No. 5.

the most desirable licenses -- would result in the de facto nullification of Section 309(j). The Commission can and should use Auction No. 35 to remedy the harm done by NextWave, et al., to both the public interest and responsible bidders such as U.S. AirWaves, by ensuring that Auction No. 35 represents a meaningful economic opportunity for entrepreneurs, including small businesses.

II. THE COMMISSION SHOULD MODIFY ITS PROPOSAL TO RECONFIGURE THE 30 MHz LICENSES TO BETTER ENSURE THE SUCCESS OF SMALL BUSINESS ENTRANTS.

In enacting Section 309(j), Congress recognized that small businesses do not have access to the same kinds of bidding resources as larger businesses, including incumbent wireless operators. Accordingly, Section 309(j) requires the Commission to prescribe regulations implementing competitive bidding so as to promote “economic opportunity for . . . small businesses” and to “ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services.”^{4/}

Numerous small businesses such as U.S. AirWaves have developed viable business plans to provide new and innovative services to the public using C and F block licenses. These business plans are premised on the legitimate expectation that C and F block licenses will be reserved for entrepreneurs, including small businesses. If the Commission changes its eligibility rules for C and F block auctions, as proposed in the Further Notice, it will create an enormous disincentive for new entrepreneurs considering entering the auction, as well as undermine the ability of

^{4/} 47 U.S.C.A. § 309(j)(4)(C), (D).

existing “entrepreneur” licensees to finance new growth opportunities, all in disregard of the intentions expressed by Congress in Section 309(j).

U.S. AirWaves does not oppose the Commission’s proposal to reconfigure each 30 MHz C block license available in future auctions into three 10 MHz C block licenses; this reconfiguration could provide each auction participant with the flexibility to bid on amounts of spectrum tailored to its own distinct business needs. However, U.S. AirWaves strongly opposes the Commission’s proposals to permit “open” bidding on many or most of the C block licenses, because the effect of such proposals would be to reduce substantially the opportunities for small businesses. U.S. AirWaves believes that it is absolutely essential that the Commission’s rules ensure that -- at the very least -- a full 20 MHz of each reconfigured 30 MHz C block license be set aside for small businesses in all markets, and most critically in the largest markets.

Access to at least 20 MHz of spectrum -- unfettered by the burden of having to outbid corporate giants -- is essential to the success of the small businesses sought to be fostered by Section 309(j). For example, in order for a new entrant to provide Third Generation (“3G”) wireless services, at least 20 MHz of spectrum is required.^{5/} Although a licensee technically could provide Second Generation services using just 10 MHz of spectrum, such an alternative is highly undesirable from a business perspective. Many industry sources recognize that the wireless market is on

^{5/} See, e.g., Letter from Thomas E. Wheeler, Cellular Telecommunications Industry Association, to William E. Kennard, Chairman, Federal Communications Commission, dated January 7, 2000 (stating that “it is not technically possible to offer 3G in 10 MHz of spectrum”).

the verge of a major shift toward wireless data services -- including Internet services -- that require the kinds of channel capacities that only 3G systems can provide.

These business dynamics suggest that capital markets will be wary of providing financing to small businesses that are new entrants unless those small businesses have meaningful opportunities for obtaining at least 20 MHz of spectrum in each market. In order to ensure that small businesses will have such opportunities, U.S. AirWaves urges that -- to the extent the Commission will permit "open" bidding at all in this auction -- it will do so on no more than one of the three 10 MHz C block licenses that would be available under the reconfiguration proposal. Moreover, as discussed below, small businesses must be afforded at least a 45 percent bidding credit for use in any such "open" auctions.

III. IF THE COMMISSION ADOPTS RULES ESTABLISHING "OPEN" BIDDING FOR ANY OF THE C OR F BLOCK LICENSES, THE BIDDING CREDITS AVAILABLE TO SMALL BUSINESSES SHOULD BE SUBSTANTIALLY INCREASED.

U.S. AirWaves applauds the Commission's proposal to increase bidding credits for "small businesses" and "very small businesses" to 25 and 40 percent, respectively. However, U.S. AirWaves believes that bidding credits of at least 45 percent are necessary if "open" bidding is permitted for any of the C or F block licenses.

Under Section 24.720 of the Commission's existing rules, "small businesses" and "very small businesses" presently qualify for bidding credits of 15 and 25 percent, respectively.^{6/} Put simply, credits of this size are inadequate. The Commission's own published data summarizing prior auction results for the Local

^{6/} 47 C.F.R. § 24.720.

Multipoint Distribution Service auctions, the Specialized Mobile Radio 900 MHz auction, and the 39 GHz auction, plainly demonstrates that, as compared with “closed” auctions, an “open” auction -- with bidding credits for small businesses ranging anywhere from 10 to 45 percent -- could yield as much as 60 percent fewer small business licensees.^{7/} Such a result is very substantial and would fundamentally alter the character of C and F block auctions.

Under the Commission’s existing rules, the financial advantages available to small businesses using bidding credits in “open” auctions easily can be trumped by the vastly superior bidding resources available to large, entrenched incumbents. From the perspective of these cash-rich incumbents, paying a 15 to 25 percent premium for a license is little more than a “nuisance fee.” In order to maintain the fundamental character of the C and F block auctions, and fulfill the legitimate expectations of previous C and F block auction participants, the bidding credits available to very small businesses participating in “open” auctions must be at least 45 percent.

IV. BTA TIERING SHOULD NOT BE ADOPTED BECAUSE IT WOULD SIGNIFICANTLY REDUCE THE OPPORTUNITIES AVAILABLE TO SMALL BUSINESSES.

U.S. AirWaves strongly opposes the Commission’s proposal to use a “tiering” approach to Basic Trading Areas (“BTAs”).^{8/} Tiering would significantly

^{7/} See Further Notice at ¶40.

^{8/} The Commission’s tiering approach would divide BTAs into two tiers according to the population size of the BTA. Specifically, the Commission proposes that, for larger BTAs, two of the three 10 MHz C block licenses would be subject to “open” bidding, whereas for small BTAs only one of the three licenses would be subject to “open” bidding. See Further Notice at ¶4.

reduce the economic opportunities available to small businesses by artificially relegating them to the “backwaters” of small, niche markets. Furthermore, tiering would undermine the ability of small businesses to obtain financing; entities capable of providing traditional financing to new entrant small businesses are likely to be inclined to believe that the business case for providing new services only in small BTAs is weak and thus will be reluctant to provide financing.

The tiering approach would also limit partnering opportunities. Potential partners with deep pockets are looking to invest in new entrants that are capable of growing into formidable market players. Small businesses cannot realistically be expected to achieve that critical goal if they effectively are locked out of the larger markets and forced to function as small, niche service providers.^{9/}

It should come as no surprise to the Commission that many of the large incumbents have expressed support for tiering,^{10/} because the approach would leave them in a position to “cherry-pick” the licenses for the most lucrative BTAs, including (for example) the C block licenses available for the Boston, Los Angeles, New York and Washington, DC markets. The tiering proposal should be abandoned, and at least 20 MHz of spectrum in each BTA should be reserved for “closed” bidding.

^{9/} As noted supra, a 10 MHz license is an inadequate platform from which to provide 3G services.

^{10/} See Further Notice at ¶21, n.70.

V. LICENSE-BY-LICENSE BIDDING PROCEDURES SHOULD BE RETAINED BECAUSE LICENSE GROUPING WOULD ELIMINATE ECONOMIC OPPORTUNITIES FOR SMALL BUSINESSES.

U.S. AirWaves strongly supports the Commission's proposal to retain license-by-license bidding procedures. License grouping uniquely favors larger businesses at the expense of small businesses because of the vast financial resources that must be marshaled in order to bid on entire groups of licenses. Coupled with "open" bidding, license grouping would have the functional effect of forcing small businesses to compete head-to-head with larger businesses in every BTA.

Given the inherent financial advantages of larger businesses, and especially the entrenched incumbents, the likely result of license grouping would be a "clean sweep" for larger businesses, leaving small businesses without any meaningful economic opportunities and, in many instances, leaving them to lay off their employees and close their offices. Such a result is entirely inconsistent with the objectives set forth by Congress in Section 309(j).

VI. THE CMRS SPECTRUM CAP SHOULD BE RETAINED TO PREVENT EXCESSIVE CONCENTRATION OF OWNERSHIP AND TO PROMOTE THE DEVELOPMENT OF COMPETITIVE MARKETS FOR WIRELESS SERVICES.

U.S. AirWaves strongly supports the Commission's proposal to retain the Commercial Mobile Radio Services ("CMRS") spectrum cap set forth in Section 20.6 of the Commission's existing rules.^{11/} The spectrum cap is part of the bedrock foundation of the Commission's efforts to prevent the development of monopolies and generally promote competition in markets for wireless services. Elimination of the spectrum cap would have the immediate consequence of causing the incumbents to

^{11/} 47 C.F.R. § 20.6.

rapidly buy-out small business licensees. Although such a "gold rush" would enrich the owners of the small business licensees, it would put a swift end to any real hope of achieving the important goals set forth by Congress in Section 309(j), including the development of competitive markets for wireless services. In those rare instances where allowing a particular entity to exceed the spectrum cap would be in the public interest, the Commission can grant appropriate rule waivers; thus, elimination of the spectrum cap not only is inappropriate but also unnecessary.

CONCLUSION

Consistent with the foregoing discussion, U.S. AirWaves urges the Commission to adopt rules for C and F block auctions that will promote the important and fundamental objectives set forth by Congress in Section 309(j), including the development of competitive markets for wireless services and the promotion of meaningful economic opportunities for small businesses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of U.S. AirWaves was served this 22nd day of June, 2000, by hand on the following:

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